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No. 88-627

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WALTER S. TAYLOR,
Petitioner,

v.

THE TAYLOR WINE CO., INC., JOSEPH L. SWARTHOUT, SHERMAN FARNHAM, ALEXANDER D. HARGRAVE, THE COCA-COLA COMPANY, and LINCOLN FIRST BANK OF ROCHESTER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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October 25, 1988

RULE 28.1 LISTING

The Coca-Cola Company

The Coca-Cola Company has an ownership interest, excluding one hundred percent ownership, in each of the following domestic and Canadian companies:

Coca-Cola Enterprises Inc.
Columbia Pictures Entertainment, Inc.
Coca-Cola Bottling Company Consolidated
Johnston Coca-Cola Bottling Group, Inc.
Brucephil, Inc.
The Coca-Cola Bottling Company of New York, Inc.
Rutgers Minority Investment Company
Dallas Minority Enterprise Small Business Investment Corp.
T.C.C. Beverages Ltd.

The Taylor Wine Company, Inc.

The parent of the Taylor Wine Company, Inc. is Vintners International Company, Inc.

Lincoln First Bank of Rochester

The parent of Lincoln First Bank of Rochester is Chase Manhattan National Corporation (a wholly owned subsidiary of The Chase Manhattan Corporation).

Lincoln First Bank of Rochester has an ownership interest, excluding one hundred percent ownership, in each of the following companies:

Aurelius Office Building Corporation
BACNY
Cevil, Inc.
Clintstone Properties, Inc.
Liflor, Inc.
Lincoln First Commercial Corporation

Lincoln First Life Insurance Company
Lincoln First Real Estate Credit Corporation
Lincoln First Mortgage, Inc.
Lincoln Lease/Way, Inc.
Chase Lincoln First Securities Processing Corporation
Chase Lincoln First Loan Production Office, Inc.
LIVEC Corporation

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises out of the 1977 merger of The Taylor Wine Company, Inc. ("Taylor Wine") into The Coca-Cola Company ("Coca-Cola"). Petitioner's principal claim is that the proxy statement which solicited approval of the merger by the Taylor Wine shareholders failed to provide details of bids which had been made several months earlier to a single shareholder of Taylor Wine, Lincoln First Bank of Rochester, for a minority (14%) block of stock ("the Lincoln Block").

After the close of discovery, defendants moved for summary judgment. The motion was granted without reservation. In a meticulously documented and carefully reasoned 52-page Report and Recommendation (set out in the Appendix to the Petition at pages A-1–A-51), Magistrate (now Federal District Judge) David G. Larimer reviewed the voluminous factual record and concluded that "there were no securities violations in connection with" the merger between Taylor Wine and Coca-Cola.[1] The Report was adopted *in toto* by Chief Judge John Curtin, whose judgment was unanimously affirmed by a panel of the Second Circuit (consisting of Circuit Judges James L. Oakes and Jon O. Newman and District Judge John F. Keenan, sitting by designation). Petitioner sought reconsideration and suggested a rehearing *en banc* by the Court of Appeals in light of this Court's decision in *Basic, Inc.* v. *Levinson*, —— U.S. ——, 108 S. Ct. 978 (1988). That application was unanimously denied. Not a single judge on the Second Circuit voted in favor of a rehearing *en banc*.

As the Magistrate's Report emphasized, the undisputed facts established that:

—all of the bids for the Lincoln Block were for amounts *less* than the proposed merger between Coca-Cola and Taylor Wine (Pet. at A-8–A-9, A-14);

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[1] The Petitioner's Statement of the Case is devoid of any citation to the record to support his allegations and is riddled with errors and mischaracterizations. Rather than attempt to correct those numerous errors here, Respondents rely on the accurate statement of facts presented in the Report of Magistrate Larimer. Petitioner's reprint of the Report in his appendix itself suffers from numerous typographical errors and a few missing sentences. Respondents, however, believe that the appendix version of the Report is close enough to the original to demonstrate the lack of merit to this case.

—no company, other than Coca-Cola, ever made a merger proposal or a tender offer for Taylor Wine (Pet. at A-22);

—not a single one of the bidders for the Lincoln Block even contacted Taylor Wine's management between September 8, 1976 (when Coca-Cola and Taylor Wine publicly announced that they were beginning merger negotiations) and January 20, 1977 (when the Taylor Wine shareholders voted, by a margin of over 98%, to approve the merger) (Pet. at A-20, A-22–23); and

—in any event, petitioner advanced no viable theory, and there is no factual basis, that would allow a court, even if it found liability, to calculate damages (Pet. at A-34).

The courts below uniformly and correctly concluded that the lower bids for a minority block of stock made many months before the issuance of the proxy statement by companies that never thereafter expressed any interest in Taylor Wine "in no way rose to the level of a material corporate development." (Pet. at A-23.) The Report expressly concluded that "the negotiations or bids that plaintiff claims should have been disclosed could not even be remotely characterized as preliminary merger negotiations. They were not merger negotiations." (*Id.*) Even so, as the Magistrate also found, the proxy statement accurately reported that other companies had bid for the Lincoln Block. (Pet. at A-21.) As the Magistrate correctly concluded: "the Proxy Statement accurately reflected the objective facts as they occurred. Nothing more was required." (Pet. at A-21.)

REASONS FOR DENYING THE WRIT

The decision below is correct, is fully consistent with *Basic, Inc.* v. *Levinson*, —— U.S. ——, 108 S. Ct. 978 (1988), and does not warrant review by this Court. No substantial federal question is presented.

1. The Decision Below Is Fully Consistent With *Basic v. Levinson*

The facts of the instant case are far different from those presented by *Basic, Inc.* v. *Levinson, supra*; nevertheless, the Second Circuit's ruling below is fully consistent with this Court's holding in that case. In *Levinson*, the corporation falsely denied in a public announcement that it was engaged in preliminary merger negotiations. In marked contrast, as soon as Coca-Cola and Taylor Wine began merger negotiations, they issued a press release announcing that fact, thereby alerting both investors and any other potential suitors. Further, it was admitted below in this case that there were no false or misleading statements in the proxy statement. (*See* Pet. at A-24.) The only issue was whether the proxy statement omitted material information, particularly details of the bids for the Lincoln Block.

In *Levinson*, this Court held that preliminary merger discussions are not necessarily immaterial as a matter of law. The Court held that there should be no rigid formula for determining materiality and reiterated that materiality is to be judged on the facts of each case by the standards first enunciated in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976).

The courts below expressly applied the standards of *TSC Industries, Inc.* v. *Northway, Inc., supra*, in concluding, on the facts of this case, that the omitted information was immaterial as a matter of law. The Report specifically concluded that "disclosure of the identity of the other companies who made preliminary bids and the amounts of the bids would not have significantly altered the total mix of information disclosed to a reasonable shareholder who was considering the merger proposal in January, 1977." (Pet. at A-21.) Indeed, as to one item of omitted information, the court expressed the view that if the information had been included, the reasonable shareholder would have asked, "So what?"

(Pet. at A-29.) The opinion below makes clear that the reasonable shareholder would have had that same reaction to all of the allegedly omitted information. In fact, as the Magistrate found, when no company matched or exceeded the Coca-Cola offer for Taylor Wine or even contacted the Taylor Wine management or shareholders after public announcement of the Coca-Cola-Taylor Wine merger negotiations, it would have been misleading in the extreme to include information suggesting to the shareholders that other bidders were waiting in the wings with better offers.[2] (Pet. at A-25.)

2. The Courts Below Correctly Found That Plaintiff Suffered No Damages

As an alternative holding, unanimously upheld by the District Court and the Court of Appeals, the Report concluded that the Taylor Wine shareholders suffered no damages from the merger. In fact, the shareholders received more than a 50 percent premium over the market price of the stock. Applying this Court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), the courts below correctly concluded that unless a plaintiff can demonstrate damages, he has no cause of action for an allegedly misleading proxy statement. The Report concluded that plaintiff had "advanced no viable theory of damages that would allow a court, even if it found liability, to calculate damages." (Pet. at A-34.) The merger price was higher than any price at which the Taylor Wine stock had traded for at least a year and

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[2] The Report cited the reasoning in such cases as *Reiss* v. *Pan American World Airways, Inc.*, 711 F.2d 11 (2d Cir. 1983), and *Staffin* v. *Greenberg*, 672 F.2d 1196 (3d Cir. 1982), only as supportive of its conclusion that an objective, reasonable shareholder would find the omitted information immaterial. The Report reasoned that if preliminary merger negotiations were immaterial, then certainly matters which do not even amount to preliminary merger negotiations, when viewed in the context of all of the facts disclosed in the proxy statement, should be considered immaterial. (Pet. at A-23-24.)

higher than any of the bids for the Lincoln Block. Since no prospective purchaser offered as much or more than Coca-Cola for Taylor Wine's stock, there is simply no way for a court to find that the Taylor Wine shareholders received less than the fair market value for their stock.

As the Second Circuit implicitly concluded in rejecting both petitioner's appeal and his request for rehearing *en banc*, the result below bears no resemblance to this Court's decision in *Bigelow* v. *RKO Radio Pictures, Inc.*, 377 U.S. 251 (1946), or the Second Circuit's decision in *New York* v. *Henderson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988).[3] Neither of those cases involved a publicly traded security which is valued every day by the free marketplace; conversely, this case does not involve calculation of what a business might have earned but for an alleged antitrust conspiracy or an otherwise fraudulent scheme. In the instant case, the free marketplace established that no one was willing to pay as much or more than Coca-Cola for the Taylor Wine stock. As the courts below found, nothing prevented any other company or entity from matching or exceeding the Coca-Cola offer. Under these circumstances, the courts were correct in concluding that it would be impermissible speculation for plaintiff to argue, contrary to the indisputable record evidence, "what might have been, but never was." (Pet. at A-34.) The silence of all of the prospective suitors at the critical time twelve years ago speaks far more elo-

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[3] Petitioner argued in his petition for rehearing to the Second Circuit that the panel's decision was inconsistent with *New York* v. *Henderson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988)—a claim he also asserts in his Petition to this Court. The request was unanimously rejected. Accordingly, despite petitioner's implication to the contrary, the Second Circuit has already considered this case in light of *Basic* v. *Levinson* and *New York* v. *Henderson*. Thus, remand to the Second Circuit for reconsideration in light of these decisions, as the petitioner requests, is unwarranted and inappropriate.

quently than the unfounded speculation in the briefs filed recently by plaintiff's counsel.

3. As Found By Every Judge Below, There Is Plainly No Merit to Plaintiff's Claim

Petitioner's request for review by this Court meets none of the applicable standards for review. There is no conflict between either of the alternate grounds for denying relief in the ruling below and the precedents of this Court; there is no conflict within or among the Circuit Courts of Appeals; and the case is fact specific and presents no significant unresolved legal issue. There is, in short, no substantial federal question. The courts below, after analyzing all of the voluminous depositions, affidavits, interrogatory answers and documents of record, unanimously and correctly concluded that there is no merit to any of plaintiff's allegations.

This meritless case has consumed far more resources of the judiciary and the litigants than it deserves. No further resources should be squandered upon it. The case is eleven years old and has been in three different districts within the Second Circuit and to the Court of Appeals for that Circuit twice.[4] Strikingly, not a single

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[4] Petitioner's counsel, Avrom Fischer, first filed a complaint challenging the 1976 proxy statement in the Eastern District of New York in the name of his close personal friend, Ralph Goldberg. Judge Charles Sifton denied plaintiff's motion for class certification, finding that Mr. Goldberg lacked the requisite integrity and trustworthiness to serve as a class representative. *Goldberg* v. *Taylor Wine*, No. 77-C-1548 (E.D.N.Y. 1977). After defendants tendered Mr. Goldberg $25 on his personal claims, the District Court granted defendants' motion for summary judgment, finding that equitable relief was inappropriate. The Court of Appeals unanimously affirmed this dismissal. *Goldberg* v. *Taylor Wine*, 636 F.2d 1201 (2d Cir. 1980). Shortly thereafter, Mr. Fischer filed this action in the Southern District of New York on behalf of Walter Taylor. After reviewing the matter, Judge Charles Haight transferred the case to the Western District of New York. The case was ultimately assigned to Chief Judge John Curtin, who directed Magis-

one of the twenty federal judges who had the opportunity to review petitioner's allegations found any merit in them. Plainly, there is none. We urge this Court to end this marathon, meritless litigation by denying the petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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trate (now District Judge) Larimer to review the entire record and make a report on defendants' motion for summary judgment. As noted, the Report, recommending the entry of summary judgment for defendants, was affirmed by Chief Judge Curtin and by a unanimous panel of the Court of Appeals.